No. 84-1360

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

THE CITY OF RENTON, *et al.*,
Appellants,
v.
PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF APPELLANTS

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REPLY BRIEF

1. Our opening brief set forth in detail the background of the Ordinance at issue here, including the documented concern about the effects of adult theatres on residential neighborhoods, parks, schools, and churches. Although Appellees (hereinafter "Playtime") have offered their own version of that history, their account contains, and even depends on, a number of factual errors. A few examples will suffice.

To begin with, it is inaccurate to imply, as Playtime does, that a "*public outcry*" over an adult business in Renton was "[t]he genesis of the ordinance." Playtime Br. 1 (emphasis in original); *see also id.* at 12. As the record makes clear (JA 411), Renton's Mayor, in a memorandum to the Council President, noted a public outcry in *other cities*, where the secondary effects of adult theatres were already well known, and expressed concern that a similar reaction might occur in Renton if and when adult theatres moved into the City.

Playtime also seeks to convey the impression that the Ordinance was passed without study [1] and after approximately "five (5) minutes consideration." Playtime Br. 3. The impression is simply incorrect. The testimony of the City's Policy Planning Director and numerous documents established that this entire problem was extensively studied for almost a year.[2] Furthermore, while it is literally accurate that the vote on the Ordinance took only a short time, Playtime ignores the facts that this was the second reading of the Ordinance (JA 134-135) and that the Council acts only after receiving advice from several committees that report directly to it. These committees had already conducted numerous public meetings, had taken testimony, and had studied relevant documents.[3] The most important committee, the Planning and Development Committee, is entirely made up of City Council members. Passage of the Ordinance, therefore, was anything but an offhand event.

2. Turning to the legal issues, Playtime suggests that the Court need not reach the constitutional questions in this case because the Court of Appeals has remanded to the District Court for a finding on the issue of motive. Playtime Br. 10-14. This argument is defective for several reasons.

[1] *See* Playtime Br. 1 ("no documented study"); *id.* at 2 ("undocumented, unstudied, and speculative perception"); *id.* at 5 (City "did *nothing* to study the effects of adult businesses") (emphasis in original); *id.* at 7 ("little, if anything, was studied by the Planning Department").

[2] *E.g.*, JA 27-29, 32-33, 47, 70-75, 107-110, 129-130, 132-133, 167-168, 170, 172-174, 185-186, 190, 195-198.

The Tacoma City Council looked at less than the Renton City Council did, and yet its ordinance, similar in many respects to Renton's, was upheld by both the Federal District Court and the Ninth Circuit. *Playtime Theatres, Inc.* v. *City of Tacoma*, No. C80-523T (W.D. Wash. Sept. 2, 1981), *aff'd*, 694 F.2d 723 (9th Cir. 1982) (unpublished opinion). Moreover, the Ninth Circuit there held that the record showed that Playtime's theatres "contributed to neighborhood deterioration." Slip op. at 3.

[3] *E.g.*, JA 27-29, 35, 47, 73-76, 128, 130-135, 178-179, 198.

First, it is not at all clear that the Court of Appeals has remanded for the reason stated by Playtime.[4] But even assuming that Playtime is correct, there is simply nothing further to be done, even under Playtime's own formulation, in regard to the issue of motivation. Playtime concedes that the Ninth Circuit will not allow the individual members of the City Council to be deposed as to their intent or motives. Playtime Br. 12 n. 15. There is no writing, film, tape, or other record of precisely what occurred at the various committee meetings other than what is already in evidence. *See id.* at 5, 12 n. 14, 23. And the only person to attend virtually all of these meetings, Mr. Clemens, has already testified to the extent of his knowledge and recollection.[5] There is simply nothing more to be said; the record is complete.

The District Court has certainly said all it could say on this subject. It specifically addressed the issue of intent (JS App 29a) and held that Renton's "governmental interest is unrelated to the suppression of free expression." *Id.* at 31a. Even though some citizens had expressed what "might be" impermissible views, these statements did not negate "the legitimate, predominate concerns of the City Council * * *." *Id.* This is, in effect, precisely the finding that the Ninth Circuit thought was necessary—namely, that this Ordinance would have been passed regardless of an arguably impermissible motive.

[4] The Court of Appeals made a point of the fact that the case was properly submitted for summary judgment on the basis of the record as it existed before the District Court. Jurisdictional Statement Appendix (hereinafter "JS App") 15a n.12. After ruling that the appropriate test was whether "a motivating factor" of the City Council was to restrict Playtime's First Amendment rights, the court held that Renton had "failed to sustain its burden of justifying its ordinance," and therefore reversed and remanded "for proceedings consistent with this opinion". JS App 20a, 22a.

[5] *See* his affidavits and testimony, for example, beginning at JA 25, 56, 103, 164 and 248.

It is hard to know what else the District Court could possibly find on remand.

The basic point, however, is that there should be no necessity to look into motive at all. Once the Court has determined, as it should, that a substantial governmental interest is being advanced by Renton and that any restrictions on First Amendment rights are entirely incidental, motive is simply not a factor. That was the approach taken in *Young* v. *American Mini Theatres*, 427 U.S. 50 (1976). In any event, the intent of the City Council, if relevant at all, is set forth in its specific findings in support of its Ordinance. JS App 81a-86a.[6]

In sum, the constitutional issues as they relate to motivation not only need no further clarification but cannot be clarified further. The case squarely poses, in its present posture, the issues presented by the Jurisdictional Statement.[7]

3. It simply is not true, as Playtime and the *amici* contend, that no study has focused on the effect of a single theatre in a given area. Seattle, for example, studied the effect of the Apple Theatre in the First Hill residential community of that city.[8]

Moreover, both Playtime and an *amicus* supporting it repeatedly and incorrectly treat Renton's Ordinance as if

[6] In fact, an entire argument of one *amicus* is based on the premise that the Court of Appeals went no further in its analysis than the reasons for the Ordinance articulated on its face. Brief of the Outdoor Advertising Ass'n of America, Inc., *et al.*, 10-11.

[7] Of course, even if the case were in an interlocutory stage, that would not prevent the Court from deciding it. *See generally New Orleans* v. *Dukes*, 427 U.S. 297, 301 (1976); *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 927 n.2 (1975); *City of El Paso* v. *Simmons*, 379 U.S. 497, 502-503 (1965); *Chicago* v. *Atchison, Topeka & Santa Fe R. Co.*, 357 U.S. 77, 82-83 (1958).

[8] *Northend Cinema, Inc.* v. *City of Seattle*, 90 Wash. 2d 709, 585 P.2d 1153, 1155 (1978), *cert. denied sub nom. Apple Theatre, Inc.* v. *City of Seattle*, 441 U.S. 946 (1979). *See also Chulchian* v. *City of Indianapolis*, 633 F.2d 27, 29 (7th Cir. 1980) (10 arrests around a single adult theatre).

it were directed to the establishment of a *single* adult theatre in the City.[9] This approach entirely misses the point of the Renton Ordinance, which was directed to adult theatres in general. Since Renton was zoning *in advance* of a problem, the thrust of its Ordinance obviously was going to be felt by the first adult theatre seeking to locate in the City (as well as every adult theatre entering thereafter). In this case, that first use happened to be Playtime. But the Ordinance was not directed at Playtime or any other first use; it was written and enacted to be applicable to *every* adult theatre that subsequently entered the City. Arguing that the Ordinance was directed only at the presence of a single adult theatre is like a drugstore contending that an ordinance which zones commercial enterprises away from residences is invalid because the first drugstore in a residential neighborhood cannot possibly cause harm.

4. The opposition briefs also focus on the fact that Detroit's City Council in *Young* required adult theatres to be dispersed, whereas the Renton City Council opted for a concentration approach to the same problem.[10] But this is an attack on a uniquely legislative decision. If, for example, there is a crime problem around each adult theatre, a city may wish to deal with the problem as a unit, concentrating the city's scarce resources in a limited area rather than having to dissipate them in a number of different locations. Moreover, in a tightly-knit, small city

[9] Playtime Br. 2, 3, 8 (incl. n.10), 16 n.18, 27-28 (incl. n.37), 31, 32, 33, 37-38, 40; Brief of American Booksellers Ass'n *et al.* (hereinafter "Booksellers Br.") 4-5, 9-10.

Playtime relies in part on a letter that is not a public document and is not a part of the record of this case or, so far as we are aware, of any other case. Playtime Br. 28 n.38, App. 1-2. The author of the letter has certainly never been examined on it.

[10] *E.g.*, Playtime Br. 8, 16-17, 28-29; Booksellers Br. 12; ACLU Br. 38-39.

like Renton,[11] dispersing theatres simply does not solve the underlying problem of adverse secondary effects on residences, schools, and the like. Detroit was concerned, *inter alia*, about adult theatres being too close to each other. Renton does not care if they are close to each other so long as they are not near certain areas where the deterioration they will cause will have particularly pernicious effects on family and property values. Only by concentrating these theatres where Renton has put them can their proximity to homes, parks, churches and schools —and their deleterious effects—be avoided.

5. Neither Playtime nor the *amici* supporting it dispute the fact that 520 acres are available for the location of adult theatres—enough space for over 400 such theatres and more space than presently occupied by either commercial uses or multi-family residences. JA 26. Playtime and *amici* nevertheless argue that the property is constitutionally lacking. Their argument on "availability," however, is based entirely on the affidavits and testimony of three people, all of whom used incorrect maps and therefore looked almost wholly at the wrong area. JA 217, 225, 230, 231, 233, 239-247, 293. Even so, as we have already demonstrated (Appellants' Br. 31), these and other witnesses showed that part of the 520 acres is unoccupied, undeveloped or in the process of development, and some parts are even now for sale.[12] The District Court's findings (JS App 28a) totally refute the notion that the set-aside zone is as pictured by Playtime and the *amici* supporting it.[13]

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[11] In Renton, for example, homes immediately border the City's business area. JA 42.

[12] The ACLU refers (p. 15) to testimony to the effect that the set-aside zone is dark at night. Subsequent to that testimony, however, the improvement plans referred to in the record (JA 257-258) have been carried out, roads have been widened and improved, and the zone is now well lit.

[13] Playtime concedes that "a substantial part of the so called available land is occupied by," among other things, "a fully-developed shopping center" (Playtime Br. 34 n.45), and yet states at another part of its Brief that "there are no locations in a commercial area of the city" where adult theatres can locate. *Id.* at 28; *see also id.* at 38 n.49, 42.

Moreover, when the "availability" argument is viewed carefully, it becomes clear that what Playtime really seeks is not available property but an optimal flow of paying customers—the same kind of argument that was rejected in *Young*, 427 U.S. at 62-63 (plurality opinion), 78-79 (Powell, J., concurring).[14] Playtime wants to be located where the most people already congregate, which will bring more customers into its theatres. But as the Point Roberts example in our primary Brief demonstrates (p. 34), an adult threatre draws customers from long distances, so that there is no need to be located at the epicenter of commerce. Here, the set-aside zone is only a short distance from downtown Renton. Moreover, Playtime would be making the same argument if *all* theatres, showing general release as well as adult fare, had been banned from Renton's downtown area. The real effect of the ruling sought, therefore, would be that a city could not zone *theatres of any kind* away from residences, schools, and the like, even if there were reasonable access to them. Such a ruling would amount to an unprecedented intrusion by the judiciary into the legislative arena.

The question, properly stated, is whether Renton, recognizing the deleterious effects of a *particular kind* of business—in this case, adult theatres—has a right to prevent that business from locating where it will do the most harm.[15] So long as there is easy access to the new loca-

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[14] Playtime Br. 35, 36, 38 n.49, 40, 42; *see also* Brief of the American Civil Liberties Union *et al.* (hereinafter "ACLU Br.") 4, 13, 15; Booksellers Br. 4, 7, 8, 11.

[15] Even the ACLU concedes that "there may be a legitimate interest in removing adult theatres from residential neighborhoods." ACLU Br. 45. It also concedes that Renton's "commercial areas are located in close proximity to residences." *Id.*, citing JA 42.

tion—and even Playtime concedes that "the area comprising the 520 acres is adequately served by roads" (Playtime Br. 36)—it should not be constitutionally relevant whether many or few people normally congregate on the streets.[16]

6. Much of the discussion in the opposition briefs goes to the concept that a zoning ordinance must be content neutral.[17] But that very issue has already been decided by *Young*.[18] The Court there recognized that it is the show-

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[16] Playtime and *amici* continue to misrepresent the nature, content and quality of the 520 acres. Playtime Br. 34 n.45; ACLU Br. 13, 15. Perhaps *amici* do not know, but Playtime surely does, for example, that the racetrack and sewage disposal plant are not within the set-aside zone. After the preliminary injunction maps were corrected by Mr. Clemens, clearly showing that these facilities were outside the zone (JA 215), Playtime's counsel had an opportunity to question him about this but failed to do so. JA 263-276, 278-280.

[17] *E.g.*, Playtime Br. 8, 14-15, 19-20, 30; ACLU Br. 1-2; Bookseller Br. 11.

[18] Perhaps recognizing this, Playtime asks that *Young* be reconsidered. Playtime Br. 14. The only reason given is that *Young* allegedly is inconsistent with *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530 (1980). But that case is inapposite for several reasons. The prohibition in *Consolidated Edison* was entirely related to content; there was nothing allegedly harmful about the inserts other than what they said, and nothing at all harmful about the distribution itself. *Id.* at 537. Here, the regulation relates to the secondary adverse effects brought about by adult theatres, not by the films in and of themselves. Moreover, *Consolidated Edison* itself distinguished the situation here. *Id.* at 538 n.5. The Court pointed out that content *can* be important and cited to language in *Young*, 427 U.S. at 70-71, and *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 746-747 (1978), to the effect that some speech is entitled to less protection than others.

Young obviously has continuing vitality; it has been cited by the Court with apparent approval in a number of different contexts. *See, e.g., Members of the City Council* v. *Taxpayers for Vincent*, 104 S.Ct. 2118 (1984); *Globe Newspapers Co.* v. *Superior Court*,

ing of adult films in public theatres that draws a different type of clientele, generates parking and traffic problems, results in increased crime, causes property values to go down, and the like. This was precisely the experience in Detroit—and in Seattle[19]—that Renton was attempting to avoid. Renton seeks not to suppress films that are entitled to at least some protection but rather to minimize the natural and inevitable consequences of the operation of adult theatres—consequences that zoning laws are uniquely and precisely tailored to address.[20]

7. The point is strenuously argued that the restrictions in Renton's Ordinance are greater than needed.[21] First, as this Court has recently made clear,[22] the judi-

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457 U.S. 596, 607 n.17 (1982); *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 121 (1982); *New York* v. *Ferber*, 458 U.S. 747, 763 (1982); *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 71-74 (1981); *Carey* v. *Brown*, 447 U.S. 455, 465 n.9 (1980); *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. at 538 n.5; *Prune-Yard Shopping Center* v. *Robins*, 447 U.S. 74, 81 (1980); *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 129 (1978); *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 231 n.28 (1977); *Smith* v. *United States*, 431 U.S. 291, 303 (1977); *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 94 (1977).

[19] As the Washington Supreme Court put it: "The concerns expressed [in Seattle] were very specific and included the attraction of transients, parking and traffic problems, increased crime, decreasing property values, and interference with parental responsibilities for children." *Northend Cinema*, 585 P.2d at 1155.

[20] The ACLU wholly misperceives the nature of the evil posed by these theatres when it states that the reasons for the Ordinance "reflect only the notion that the outward appearance of an adult theatre is offensive to some people" (ACLU Br. 30) and that "people passing by the theatre * * * are subjected only to the *message* that adult films are shown inside." *Id.* at 31 (emphasis in original). Renton is not concerned about appearances but about the deterioration of whole neighborhoods. *Cf. Erznoznik* v. *City of Jacksonville*, 442 U.S. 205 (1975).

[21] Playtime Br. 9, 19-21, 26-30, 40; Bookseller Br. 7-8; ACLU Br. 4, 7-12.

[22] *United States* v. *Albertini*, 105 S. Ct. 2897, 2907 (1985).

ciary should not be second-guessing legislative bodies as to whether they could have drawn a regulation more narrowly, or in some other fashion, so long as the regulation they did enact is within their constitutional powers. Renton was clearly carrying out its proper constitutional functions in zoning adult theatres, and the choices it made as to distances, concentration, etc., are entirely legislative in nature.[23] Second, even if the Court were to apply a "least-restrictive regulation" test, it is hard to imagine how Renton could have dealt with its particular problems any more narrowly than it did. On the one hand, adult theatres had to be located away from the areas they would most seriously affect, or the zoning would be useless. On the other hand, the restriction resulted in an area which is readily accessible and which would hold over 400 of such theatres. The Ordinance, then, effectively accomplishes its purposes and yet has only a minimal effect on the free expression of ideas.[24]

8. The ACLU urges the Court to apply the "strict scrutiny" test of *Schad* v. *Borough of Mount Ephraim*, or the "motivating factor" test of *Mt. Healthy City School District* v. *Doyle*, 429 U.S. 274 (1977). ACLU Br. 19-34. It makes no difference which test, or any combination of them, is applied; Renton's Ordinance passes muster. Even if, for example, strict scrutiny were to be applied in an effort to find an improper motivating

[23] Playtime and *amici* cannot agree among themselves as to whether the rules relating to time, place and manner restrictions even apply to this case. Playtime argues that Renton's Ordinance is not a proper time, place and manner regulation (Playtime Br. 14-15), whereas the ACLU contends that the Ordinance should not be measured by time, place and manner standards at all. ACLU Br. 12 n.2.

[24] It is highly significant that when Playtime attempts to suggest a less restrictive regulation, all it can come up with is a prohibition against "pictorial advertising which could be viewed from the street by passersby" (Playtime Br. 26 n.34)—a solution that both misperceives the problem and fails to construct an answer to it.

factor, this Ordinance meets the test, for the reasons set forth in our main Brief. We would point out, however, that the *Schad* and *Mt. Healthy* cases are odd ones to rely upon, when *Young* so closely applies. *Schad* was a case where free expression was totally stilled with no alternative means of communication, and in *Mt. Healthy* an inquiry into motive was made only *after* it was first determined that First Amendment rights had apparently been violated.[25]

What the ACLU and Playtime fail to understand is that this case involves the kind of incidental restrictions on speech that they attribute to *Young*, *Taxpayers for Vincent*, and *United States* v. *O'Brien*, 391 U.S. 367 (1968). Renton has not in any way attempted to regulate the content of adult films. This case involves only whether these films are to be shown in one part of town, where Playtime wants to be located, or in another part, where they will not cause adverse secondary effects.[26]

9. Little need be said about Playtime's arguments that were not addressed by the Court of Appeals. The Equal Protection Clause does not require a city to enact a comprehensive land-use scheme in one action. Instead, a city can, and should, employ a more conservative, step-by-step approach, which allows a greater degree of flexibility. Renton has chosen to deal with adult theatres

[25] The ACLU takes a strange and contradictory position in regard to motive. It states, on the one hand, that the area in which adult theatres are being placed is an unsatisfactory one, which proves that the City had an improper motive, and then, in order to bolster an entirely different argument, it contends that Renton did not choose the area at all—that the area came about by chance when the City applied its 1000-foot restrictions. ACLU Br. 5-6, 13-16, 23-24, 32.

[26] Perhaps in recognition of the little support it derives from this Court's majority opinions, Playtime repeatedly cites to and relies upon concurring and dissenting opinions throughout its Brief. *E.g.*, Playtime Br. 19, 20, 21, 29-30, 31, 32, 39, 40, 43, 45.

first as one step in an on-going process, particularly since many of the adult uses cited by Playtime (Playtime Br. 10, 19 n.21, 26, 41) are not even in the City. JA 174. Moreover, there is no reason whatever why an adult theatre must be treated the same as a bar or a bookstore. As a matter of fact, by arguing that a video store that rents and sells adult movies requires the same treatment as an adult theatre (Playtime Br. 42-43), Playtime rather than Renton is focusing on film content as opposed to the secondary effects of film exhibition. Playtime wholly ignores the fact that adult films rented or purchased from a video store are played in the home. *See Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 65-66 (1973).[27]

As for the vagueness argument, we merely ask the Court to compare Renton's Ordinance with that approved in *Young*. Renton's Ordinance, including the requirement that adult films be played as part of a continuing course of conduct and in a manner appealing to a prurient interest, is as clear and precise as any ordinance of which we are aware.[28] In any event, there can be no question that *Playtime* understands the Ordinance and comes within its prohibitions. Playtime's President acknowledged on the record that he was aware of the Ordinance, he knew it applied to him, he intended to show the

[27] Video stores *are* relevant for different reasons, however. They show that these same films are readily available to those in Renton who want to see them. They constitute an "ample alternative mode [] of communication" not only for the same message but through the same medium. *Cf. Taxpayers for Vincent*, 104 S.Ct. at 2133. Moreover, if Renton was concerned about *content*, it would have attempted to regulate video stores as well as adult theatres.

[28] The Detroit ordinance was far more pervasive than this one. In Detroit, an adult theatre could not even locate within 1000 feet of two other hotels, secondhand stores or shoeshine parlors. *Young*, 427 U.S. at 52, incl. n.3. There is no comparable provision in Renton's Ordinance.

adult films covered by the Ordinance, and he intended to do so on a regular, continuous basis.[29]

CONCLUSION

Playtime concedes that "the power of local governments to zone and control land use is broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both rural and urban communities." Playtime Br. 20. That is what this case is all about. The City of Renton is dealing with a difficult problem—the stark reality of the secondary effects of adult theatres. It recognizes that these theatres and the films they show are entitled to freedom of expression. But it also believes that so long as the populace has ready access to sexually explicit films, *where* they are shown is a matter of legitimate concern and a subject for legitimate regulation by the City. Renton has expressed its concern and its regulation through an Ordinance that gives full play to freedom of expression.

[29] JA 328-329, 339, 349, 368; Playtime's Complaint, JS App 61a. *Cf. Young*, 427 U.S. at 58-61. *See also* the state court opinion describing the character of Playtime's films in the Brief Amicus Curiae of the National League of Cities, *et al.*, App. 1a.

Moreover, it is noteworthy that Playtime did not even develop its record in regard to vagueness (Playtime Br. 46-48 nn.53-61, App. 3-15) in this lawsuit but instead relies entirely upon the record of another case. *City of Renton* v. *Playtime Theatres*, Cause No. 82-2-01244-2, King County, Washington Superior Court.

The judgment below should be reversed.

Respectfully submitted,

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